



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Johnson Engineering and Maintenance  
File: B-228184  
Date: December 3, 1987

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### DIGEST

Although the Competition in Contracting Act of 1984 mandates that agencies obtain "full and open competition" in their procurements through the use of competitive procedures, the proposed sole-source award of a contract under the authority of 10 U.S.C. § 2304(c)(1) is not objectionable where the agency reasonably determined that only one source could provide the required services because that source holds proprietary software rights for the system to be serviced under the contract, and the protester has failed to prove its allegation that access to software information is unnecessary to perform the contract.

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### DECISION

Johnson Engineering and Maintenance protests the Army's proposed award of a sole-source contract to Honeywell, Inc. under solicitation No. DABT01-87-R-1054 for maintenance and repair services for the Honeywell Energy Monitoring and Control System (EMCS) located at Fort Rucker, Alabama. Under the proposed contract, Honeywell is required to maintain and repair system hardware and software, including supplying any factory revisions to the software. Johnson alleges that the solicitation of these services on a noncompetitive basis is improper because Fort Rucker's requirements are not of a type available from only one responsible source.

We deny the protest.

In 1982, the Army contracted with Honeywell to install an EMCS known as the "Delta 5600" system in Fort Rucker. The EMCS monitors and controls such critical post-systems as the water system, the sewage treatment plant, sewage lift station, boiler plants and electrical substation breakers. It also monitors and controls heating, ventilating and air-conditioning in approximately 50 buildings. Honeywell has retained proprietary rights to all software in the Delta

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5600 system. Under a limited software rights agreement that was negotiated as a modification to the original construction contract with Honeywell, the Army may use the privately developed data and software exclusively for its own use but cannot release the data or provide access to any third parties without Honeywell's consent. Each year since the system was installed, the Army has negotiated a sole-source contract with Honeywell for maintenance and repair services for the EMCS. In May 1987, the Army published a notice of its intention to negotiate another service contract with Honeywell in the Commerce Business Daily (CBD), as required under the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. §§ 2304(c)(1) and (f)(1)(c) (Supp. III 1985). Johnson responded to the CBD notice, requesting further information and contending that there are "numerous small firms fully qualified to maintain your system." In June, the Army conducted a market survey to identify any qualified and interested sources to provide the repair and maintenance requirements. According to the agency report, the survey revealed that there are sources available to perform maintenance on the Delta 5600 hardware, but no sources available with access to software data. In July, the contracting officer prepared a Justification and Approval for the procurement of the services on a sole-source basis, citing the authority of 10 U.S.C. § 2304(c)(1), which permits a noncompetitive award where only one known responsible source is available and no other type of property or services will satisfy the needs of the agency. The action was approved by the requisite authority, and the Army again proposes award on a noncompetitive basis to Honeywell.

Johnson contends that the proposed award would violate 10 U.S.C. § 2304 as implemented by Federal Acquisition Regulation, 48 C.F.R. § 6.302 (1986), because Fort Rucker's requirements are not ones that are only available from one source. The protester alleges that the proprietary agreement with Honeywell is self-serving, and that no actual trade secrets are involved in servicing the equipment. Johnson contends that "such material and information was already in the marketplace" and "that Johnson Engineering, as well as other contractors, routinely provide maintenance of the type required at Fort Rucker on similar if not identical systems." In this connection, Johnson asserts that the Army did not conduct an adequate or proper market survey, but rather, structured its survey "to build justification for [a] sole-source procurement."

Because the overriding mandate of the CICA is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), this Office will closely scrutinize sole-source procurements under the exception to that mandate

provided by 10 U.S.C. § 2304(c)(1). WSI Corp., B-220025, Dec. 4, 1985, 85-2 CPD ¶ 626. Where, however, the agency has substantially complied with the procedural requirements of CICA, 10 U.S.C. § 2304(f), calling for the written justification for and higher-level approval of the contemplated sole-source action and publication of the requisite CBD notice, we will not object to the sole-source award unless it can be shown that there is not a reasonable basis for the sole-source award. WSI Corp., B-220025, supra; see also Dynamic Instruments, Inc., B-220092, et al., Nov. 25, 1985, 85-2 CPD ¶ 596. In sum, excepting those noncompetitive situations which arise from a lack of advance planning, a sole-source award is justified where the agency reasonably concludes that only one known source can meet the government's needs within the required time. Data Transformation Corp., B-220581, Jan. 16, 1986, 86-1 CPD ¶ 55.

Here, the Army has complied with the statutory procedural requirements, under CICA at 10 U.S.C. § 2304(f), calling for the written justification for and higher-level approval of the contemplated sole-source action and publication of the requisite CBD notice. The propriety of the agency's decision to procure these services on a sole-source basis therefore rests on whether or not it was reasonable to conclude that only one source was available. The Army contends that the requirement for EMCS repair and maintenance at Fort Rucker can only be satisfied through Honeywell, since this firm is the only one that legally has the software data including all necessary updates and revisions as well as the essential information, knowledge and test equipment to properly perform the required testing, diagnostic routines and evaluations, and make necessary repairs or corrections. The agency emphasizes that despite repeated requests to Honeywell, it has been unable at this time to obtain the right to sell, transfer, publish, disclose, display or otherwise make available Honeywell computer software to any third party. Although Johnson alleges that it is qualified to provide the required services, the agency points out that the protester has not substantiated this claim with regard to software.

The record indicates that a more sophisticated EMCS such as Fort Rucker's requires more complex software; because of this complexity, access to Honeywell's software information is necessary in order to perform EMCS maintenance and repair. The record shows that the standard software set includes diagnostic and "debug" software, which facilitates preventive maintenance and repair troubleshooting. Diagnostic software, developed specifically for use with the Delta 5600 system, allows service technicians to identify areas requiring attention, and is essential for performing the services required here. In addition, the record indicates

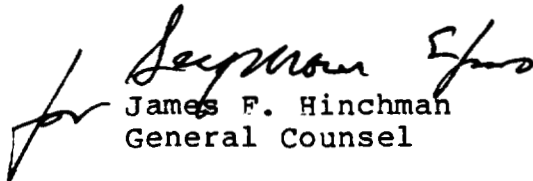
that "software bugs" tend to arise as each Delta 5600 customer uses its EMCS in its own unique way. When this occurs, or when Honeywell itself discovers bugs in the system, software "fixes" or updates are issued. Each Delta 5600 customer needs to be updated each time a new release is issued, and this generally occurs once or twice per year; without such updates, each customer would eventually have different software on its EMCS, and manufacturer software support would become impracticable. Also, software documentation is kept current as Honeywell issues revisions to modify manuals. Thus, access to software, documentation and spare parts is necessary to perform the repair and maintenance required under this contract. Simply stated, the contract covers repair and maintenance of the software and without properly running software the diagnostic features of the software would be impacted adversely and, in turn, repair and maintenance of the system under this contract would also be adversely impacted. In our view, the record reasonably supports the agency's conclusion that Honeywell is the only known source that can meet this requirement because only Honeywell has complete access to all the necessary software information.

Regarding Johnson's charge that contractors other than Honeywell routinely provide maintenance as required by Fort Rucker on similar systems, the agency notes that Johnson has not provided any specific and detailed information which identifies other sources and locations with the exact system in use at Fort Rucker. Although Johnson has identified users of "similar systems," the record indicates that many systems are not as complex as Fort Rucker's EMCS, and that more recent government contracts for these systems have required sublicense agreements that give the government the right to divulge software rights to third parties for maintenance purposes.

The protester also challenges the Army's market survey as "inaccurate and misleading." Johnson says that although it identified for the Army a number of qualified sources for servicing Honeywell equipment, the Army only contacted approximately 20 percent of these sources. The protester contends that the Army was selective in structuring its survey and in recording the responses received, and that its aim was to build justification for the sole-source procurement. In essence, Johnson is arguing that the agency acted in bad faith. We have repeatedly held, however, that the protester has the burden of proof when alleging bad faith, and a showing of bad faith requires proof that the contracting official has a specific and malicious intent to injure the protester. See, e.g., Washington Patrol Service, Inc., B-225610, et al., Apr. 7, 1987, 87-1 CPD ¶ 384. Johnson has presented no such proof but attributes to bad faith the

contracting officer's failure to contact every source submitted by the protester. In any event, the contracting officer's survey appears to have been adequate. We note in this regard that some of the sources contacted provided information that conflicted directly with the protester's claims and that none of the commercial sources contacted could overcome the obstacle of Honeywell's proprietary software rights. Also, the user activities surveyed had less sophisticated Honeywell equipment or equipment which was not comparable to the EMCS at Rucker. In these circumstances, we believe that the contracting officer had enough information to conclude that the services could only be provided by one known source. However, consistent with its duty under CICA, we expect that the Army will continue its efforts to obtain rights to the Honeywell software for use in the future.

The protest is denied.

  
James F. Hinchman  
General Counsel